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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1330

FRANCIS T. GLYNN,
PETITIONER,

v.

ROBERT H. DONNELLY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

FRANCIS T. GLYNN,
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v.

ROBERT H. DONNELLY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner Francis T. Glynn prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on October 11, 1973.

Opinion Below

The Opinion of the United States Court of Appeals for the First Circuit is officially reported at 485 F.2d 692 and is reproduced in the Appendix at pp. 2-6. A previous Opinion of the United States Court of Appeals for the First

Circuit denying bail is reported at 470 F.2d 95 (1972). The Opinion of the United States District Court for the District of Massachusetts is officially reported at 360 F. Supp. 214, and is reproduced in the Appendix at pp. 8-16.

Jurisdiction

The judgment of the United States Court of Appeals denying Petitioner's Application for a Certificate of Probable Cause under 28 U.S.C. § 2253 and Rule 18 of the Rules of the United States Court of Appeals for the First Circuit was entered on October 11, 1973. A timely Petition for Rehearing was denied on December 4, 1973. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented

I. Whether a defendant on trial is denied Due Process by a construction of the *Uniform Law to Secure the Attendance of Witnesses . . . in Criminal Proceedings* allowing the state trial judge to grant ex parte applications by the prosecutor for process, and to impound the papers to conceal them from defendant?

II. Where the ten applications filed pursuant to said construction in Trial No. 1 are relevant also to another indictment of said defendant, which has previously been assigned to the same judge for later trial, does such later trial (presided over by the same judge) deny Due Process to said defendant?

III. If such a construction of the *Uniform Law* is limited so as to apply only where the trial judge sits with jury, does it impermissibly burden the defendant's Sixth Amendment Right to trial by jury?

Constitutional and Other Provisions Involved

SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts General Laws, Chapter 233, Sections 13A-13D (Uniform Law to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, inserted by Mass. St. 1937, c. 210, pp. 177-180 inc.). The Statute is printed in the Appendix at pp. 17-20.

28 U.S.C. § 2253:

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on

appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

Federal Rules of Appellate Procedure, Rule 22(b):

(b) *Necessity of Certificate of Probable Cause for Appeal.* In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request

addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.

United States Court of Appeals for the First Circuit, Rule 18:

FRAP 22(b) is supplemented as follows. In this circuit neither the court nor a judge thereof will initially receive or act on a request for a certificate of probable cause if the district judge who refused the writ is available. The request to the district judge must be made in writing, at or before the time the appeal is filed, but in any event before the time for filing the notice of appeal expires. If the district judge denies the certificate, and a notice of appeal has been filed, this court will review his decision. However, it may decline to make such review unless a memorandum has been filed by the petitioner, either in the district court, or in this court, giving specific and substantial reasons and not mere generalizations why such relief shou d be granted.

One week after the district court file has been received in this court, the Clerk will present the record to the court, with or without a separate request for a certificate of probable cause addressed to that court. If no sufficient memorandum has been filed by that time, the court may deny the certificate without further consideration. The effect of such denial is to terminate the appeal.

Statement of the Case

The questions here presented arise out of two criminal jury trials before the same judge of the forty-two-judge Massachusetts Superior Court. All indictments here involved were assigned to that judge prior to the first trial.[1]

[1] Petition, Return, par. 7.

Petitioner Glynn, on July 21, 1972 filed in the United States District Court for the District of Massachusetts a petition for habeas corpus attacking on due process grounds his convictions and sentences in each case. The facts were established in the District Court by the pleadings, and a stipulation.[2] The District Court after hearing, on June 11, 1973 entered a judgment denying the writ, and thereafter, on July 18, 1973 denied a timely Application for Certificate of Probable Cause to Appeal.[3] Subsequently, on October 11, 1973, the Court of Appeals for the First Circuit denied, in a five page opinion, a timely application made to that Court pursuant to its Rule 18, for such certificate.[4] A timely petition for rehearing was denied on December 4, 1973.[5]

The first state trial, which began on July 18, 1966, involved indictments of Glynn, and twelve others for conspiring to give, offer or promise a bribe to Hanley (No. 11900) and Garfinkle (No. 11910), both executive officers of the Commonwealth. Counts I and II of Indictment 11966 charged that Glynn did give, offer or promise a bribe to Hanley and Garfinkle, respectively. One J. Miller Redfield was named as co-conspirator but not defendant in 11900 and 11910.[6]

In the Second State Trial Glynn and others were placed on trial on Indictment 11908 on a charge of conspiring to give, offer, or promise a bribe to Hanley. J. Miller Redfield was named as co-conspirator but not defendant.[7]

Ten ex parte applications for out-of-state process against Redfield and four other persons were made by the prose-

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[2] 360 F. Supp. 216, n. 1; A-12, n. 1, *infra*.
[3] 485 F.2d 693; A-3, *infra*.
[4] A-1 to A-6, *infra*.
[5] A-7, *infra*.
[6] Substitute Stipulation, Ex. II, pp. 1368, 1541; copies of indictments, Substitute Stipulation, Ex. I, pp. 1-4 inc.
[7] Substitute Stipulation, Ex. II, pp. 1369, 1541; copy of 11908, Ex. I, p. 5.

cutor during the first trial on July 20, August 16, October 21 and 26, 1966 to the trial judge, who on each occasion granted the application and impounded the papers. The petitioner first heard of this some five months after his trial and conviction, but prior to the start of his second trial, and filed timely exceptions to the impounding orders and a motion to revoke them.[8] It then appeared that on the second day of the first trial the prosecutor stated, and the trial judge certified to the California courts that Redfield had "personal knowledge that a sum of money was delivered to another for the purpose of being paid to an executive officer . . . which matters he has testified to before the . . Grand Jury." Like statements as to personal knowledge were made on the other occasions. None of these persons was called to the stand. Petitioner saved his rights by motion for new trial in the First Case, and by motion that the judge disqualify himself in the Second Trial.[9]

In submitting to the jury Indictment 11966 charging in Count I that Petitioner gave, offered, or promised a bribe to Hanley and in Count II that Petitioner gave, offered or promised a bribe to Garfinkle, the court required the jury to answer as to each count, prior to reaching its general verdict, the following: 1(a) Did the defendant give a bribe? 1(b) If yes, in what city or state did he do so? 2. Did the defendant offer a bribe ? 3. Did the defendant promise a bribe? The jury answered "No," "blank," "Yes," "Yes."[10]

On December 18, 1966, the jury returned verdicts of guilty on Indictment 11900, 11910, and 11966. On January 6, 1967, the trial judge imposed on Glynn 1-year concurrent

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[8] 360 F. Supp. 215; A-9 to A-10, *infra*; Exceptions and Motion To Revoke, Substitute Stipulation, Ex. 1, pp. 39-49, inc.

[9] 360 F. Supp. 215; A-9 to A-10, *infra*.

[10] Petition, Return, par. 12.

sentences on 11900 and 11910, to commence on and after a 2½ - 3 year sentence on 11966.[11]

On June 10, 1968, the jury in the second trial found Glynn guilty on Indictment 11908. During that trial witness applications were presented to another than the trial judge.[12] On June 20, 1968 the trial judge imposed a 1-year sentence of imprisonment, to be served on and after the previous sentences.[11] Appeals with respect to the first and second trials having been consolidated, the Supreme Judicial Court of Massachusetts affirmed all convictions. *Commonwealth* v. *Beneficial Finance Co.*, Mass. Adv. Sh. (1971) 1368. This court denied certiorari on June 12, 1972. *Farrell et al.* v. *Massachusetts*, 407 U.S. 910. Glynn was taken into custody on July 20, 1972 [13] and immediately filed the present Petition for habeas corpus under 28 U.S.C. § 2254.

Reasons for Granting the Writ

I. THE DECISION OF THE STATE COURT, APPROVED BY TWO FEDERAL COURTS BELOW, IS NOW THE LEADING AUTHORITY ON THE PROPER ADMINISTRATION OF THE UNIFORM WITNESS LAW DURING THE ACTUAL CONDUCT OF A STATE CRIMINAL TRIAL; THE LAW IS PRESENTLY IN EFFECT IN FIFTY-ONE JURISDICTIONS; THE STATE COURT CONSTRUED THE LAW TO AUTHORIZE THE PROSECUTOR TO COMMUNICATE *Ex Parte* WITH THE TRIAL JUDGE DURING THE ACTUAL TRIAL AND TO CONCEAL THAT COMMUNICATION FROM DEFENDANT; CERTIORARI SHOULD ISSUE TO DETERMINE WHETHER THIS CONSTRUCTION OF THE LAW DEPRIVES THE DEFENDANT OF DUE PROCESS.

May a state prosecutor, during a trial, apply *ex parte* to the *trial judge* for process against an out-of-state wit-

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[11] Petition, Return, par. 3.
[12] Substitute Stipulation, Ex. I, pp. 50-51.
[13] Petition, Return, par. 2.

ness? Does it make any difference whether the judge is sitting *with or without jury?*

The Uniform Law of Secure the Attendance of Witnesses From Without a State in Criminal Proceedings [14] provides merely that "a justice or special justice" of the court in which the proceeding is pending may issue a certificate to be presented to a court of the state in which the witness is found.[15]

The present record shows the perils of such *ex parte* transactions during trial. On the second day of Glynn's first trial (on the charge of bribing and conspiring to bribe state officers) the prosecutor, by *ex parte* application, induced the state trial judge to certify under the Uniform Law that one Redfield (who was named in the indictment as a co-conspirator),

> ". . . is a necessary and material witness for the Commonwealth of Massachusetts at such trial by reason of the following:
>
> He has personal knowledge that a sum of money was delivered to another for the purpose of being paid to an executive officer . . . which matters he has testified to before the . . . . Grand Jury . . . ."

The papers were impounded by the judge with the result that Glynn knew nothing of the matter [16] till after conviction and sentence.

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[14] Mass. G.L. c. 233, §§ 13A-13D; A-17 to A-20, *infra*. The Act has been adopted in 47 states, the District of Columbia, the Panama Canal Zone, Puerto Rico, and the Virgin Islands.

[15] Mass. G.L. c. 233, § 13B; A-19, *infra*. The Trial Court, the Superior Court of Massachusetts, had forty-two justices at the time of Glynn's trials. During his second trial, after the present point was raised, applications were handled by another than the trial judge. Petitioner, prior to the start of that trial, moved that the trial judge disqualify himself because of the *ex parte* applications entertained by him during the first trial.

[16] Nor of nine other similar transactions which occurred during the first trial.

Three courts have now made hash of the *Uniform Law* in attempting to justify the transaction just described.

1. The Supreme Judicial Court of Massachusetts construed the *Uniform Law* to authorize issuance of a certificate by the trial judge only,[17] and then only when he sits with a jury.

> ". . . . To hold that the prosecution's representations so prejudiced the judge as to preclude a fair trial would render useless the statutory procedure of G.L. c. 233, §§ 13A-13D. Neither the judge's certificate nor the representations were ever seen by the jurors, who, of course, were the finders of fact.[18]

2. The United States District Court below held (in conflict with the decision of this Court in *New York* v. *O'Neill,* 359 U.S. 1, 3-4; *infra,* p. 14), that the *Uniform Law* called upon the judge of the demanding state only for a general finding that the person sought "is a material witness"; that "reasonably interpreted" his certificate included no other finding; that the "basis of his certification was simply the representation of the Attorney General that Redfield 'has personal knowledge . . . [etc.]' "[19] Stating that neither the representations nor certificates had ever been shown to the jury, the District Court ruled that there was no "reasonable possibility" that they contributed to Glynn's convictions.[20]

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[17] The record before it showed that during the second state trial certificates had been issued, not by the trial judge, but by another justice of the Superior Court.

[18] Mass. Adv. Sh. (1971) at 1470, 275 N.E.2d at 100; quoted by District Court below, 360 F. Supp. at 216; A-11, *infra.*

[19] 360 F. Supp. at 217; A-13 to A-14, *infra.*

[20] 360 F. Supp. at 217-218; A-14, *infra.*

The holding of the District Court, we suggest, conflicts in principle with *Gregg* v. *United States,* 394 U.S. 489, 492, in which this Court recognized a practical fact of trial — that a bias created in the trial judge may, in a matter of moments, be communicated by him to the jury by a single instruction or utterance. In the case at bar six months of trial elapsed between the first *ex parte* representation and the verdict; nine other applications were made to the judge during the interval. The holding conflicts also with a broader and more fundamental rule lately restated by Mr. Justice Marshall in *Peters* v. *Kiff,* 407 U.S. 493, 501-502 (1972):

> " 'A fair trial in a fair tribunal is a basic requirement of due process.' In re Murchison, 349 U.S. 133, 136 (1955). The due process right to a competent and impartial tribunal is quite separate from the right to any particular form of proceeding. Due process requires a competent and impartial tribunal in administrative hearings. Goldberg v. Kelly, 397 U.S. 254, 271 (1970), and in trials to a judge, Tumey v. Ohio, 273 U.S. 510 (1927). Similarly, if a State chooses, quite apart from constitutional compulsion, to use a grand or petit jury, due process imposes limitations on the composition of that jury.
>
> . . . . . .
>
> "Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias. This rule, too, was well established long before the right to jury trial was made applicable in state trials, and does not depend on it . . . . . As the Court said in In re Murchison, *supra,* 'Fairness of course requires an ab-

> sence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.' 349 U.S., at 136."

The District Court below further held that "nothing in aggravation of the offenses of which petitioner stands convicted could reasonably be inferred from the representations or certificates", and that petitioner's sentences could not have been affected by them.[21] But, we suggest, the general verdicts of guilt (of bribery and conspiring to bribe) are supportable by evidence of a promise alone, without evidence of payment. *Commonwealth* v. *Hurley,* 311 Mass. 78, 81; 40 N.E. 2d 258, 260. Moreover the jury, who heard nothing from the out-of-state witnesses, found specially that no payment was made. A showing that money was raised for the purpose of payment (as in the Redfield certificate) is obviously a showing in aggravation. The trial judge imposed on Glynn 2½ 3 years for bribery, and 1 year *on and after* for conspiracy. In the second case he added an additional year for conspiracy to be served *on and after* the sentences previously imposed. The Commonwealth has failed to sustain its burden of showing that these sentences were in no way brought about by the *ex parte* representations. *Chapman* v. *California,* 386 U.S. 18.

Petitioner urges that the *Uniform Law,* as construed by the state court to apply to jury trials only, imposes an unconstitutional burden on his Sixth Amendment right to trial by jury. *United States* v. *Jackson,* 390 U.S. 570. Correctly observing that Glynn neither waived, nor ever considered waiving, jury trial, the District Court erroneously ruled that Glynn had for that reason no standing to raise the *Jackson* question, citing no authority.[22] But the

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[21] 360 F. Supp. at 218; A-15, *infra.*
[22] 360 F. Supp. at 218; A-16, *infra.*

defendant in *Griffin* v. *California*, 380 U.S. 609, who neither waived nor considered waiving his privilege not to testify, nevertheless had standing to challenge comment on his failure to testify. The decision of the District Court is thus in conflict with *Griffin*. Cf. *Brady* v. *United States*, 397 U.S. 742.

3. In denying Glynn leave to appeal, the Court of Appeals relied on its own completely new construction of the *Uniform Law*:

> ". . . . This kind of pre-trial[23] representation seems to us not basically different from seeking a warrant for arrest, *a search warrant*, an order permitting limited electronic surveillance. *In all such cases a judge may be exposed to ex parte assertions which he passes on, not for their truth, but for their legal sufficiency* in justifying proposed police action assuming their truth . . . ." (485 F.2d at 694; A-5, *infra;* italics and footnote ours.)

So far as it deals with search warrants this statement directly conflicts with the decisions of this Court in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 450, and *Johnson* v. *United States*, 333 U.S. 10, 13:

> "The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate* instead of being judged by the officer engaged in . . . ferreting out crime . . . ." (italics ours)

[23] There is no dispute that each of the ten *ex parte* applications here involved was filed with the trial judge while Glynn's first trial was going on, and at a time when the indictment involved in his second trial was already assigned for trial to the same trial judge.

Furthermore, the decision of the Court of Appeals conflicts in principle with *New York* v. *O'Neill*, 359 U.S. 1, in which this Court held the *Uniform Law* constitutional on its face over the objection of an out-of-state witness. There a New York judge certified, after making detailed findings,[24] that O'Neill was a necessary and material witness before a New York grand jury. The certificate was the only evidence against O'Neill in a Florida proceeding brought under the *Uniform Law*. This Court, reversing the Supreme Court of Florida, held the *Uniform Law* constitutional on its face, including the provision[25] that the certificate of the judge of the demanding state ". . . shall be prima facie evidence of all the facts stated therein." 359 U.S. 1, 3-4. Such a presumption would obviously be arbitrary and unconstitutional if the judge issuing the certificate had no duty to pass upon the truth of the findings set forth in it. *Manley* v. *Georgia*, 279 U.S. 1, 5, 6.

We respectfully urge that the decision of the Court of Appeals denying leave to appeal is based upon a complete misunderstanding of the applicable constitutional decisions. We ask that this Court issue a writ of certiorari to

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[24] The findings are described in the opinion of the Supreme Court of Florida appended to the Petition for Certiorari, A. 18 to A. 21 inc. In summary the findings were as follows: that the grand jury was investigating the question whether union officials had conspired to steal union funds; that O'Neill was General President, Chairman of the Executive Board and of the Social Security Department which administers the welfare fund of a (named) union; that the grand jury proposes to question him about the union funds; that O'Neill has refused to appear voluntarily, and is a resident of Illinois, which has no reciprocal statute; that the union convention is shortly to be held in Miami; that the union constitution requires O'Neill as president, to be present and preside. The Florida Supreme Court noted that the affidavit of the prosecutor was "harmonious with the findings." *Ibid.*, A. 20.

[25] Mass. G.L. c. 233, § 13A; A-18, *infra*.

determine the proper constitutional construction of the Uniform Law, with respect to the rights of a trial defendant. *Humphrey* v. *Cady*, 405 U.S. 504, 506 (1972).

Conclusion

For the reasons set forth above a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the First Circuit

Misc. No. 73-8046

FRANCIS T. GLYNN,
PETITIONER, APPELLANT,

v.

ROBERT H. DONNELLY,
RESPONDENT, APPELLEE.

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

ORDER OF COURT

Entered October 11, 1973

It is ordered that the application for a certificate of probable cause be, and the same hereby is, denied.

By the Court:

(s) DANA H. GALLUP
Clerk

United States Court of Appeals
For the First Circuit

Misc. No. 73-8046

FRANCIS T. GLYNN,

APPELLANT,

v.

ROBERT H. DONNELLY,

APPELLEE.

ON APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

Before COFFIN, *Chief Judge,*
McENTEE and CAMPBELL, *Circuit Judges.*

James W. Kelleher for petitioner upon application and memorandum in support thereof.

October 11, 1973

COFFIN, *Chief Judge.*

Petitioner, Francis T. Glynn, was convicted in Massachusetts Superior Court of the crimes of corruptly giving, offering and promising a bribe to certain public officials of the Commonwealth, and of conspiring to give, offer and promise a bribe to these officials. His conviction was affirmed by the Supreme Judicial Court of Massachusetts, *Commonwealth* v. *Beneficial Finance Co.*, 1971 Mass. Advance Sheets 1367, 275 NE2d 33 (1971), *cert. denied*, 407 U.S. 910, 92 S. Ct. 2433, 32 L. Ed. 2d 689 (1972). Petitioner then sought a writ of habeas corpus from the federal district court and also sought bail pending a hearing on the merits. Upon denial of bail by the district court petitioner appealed to this court, which affirmed the lower court's decision, *Glynn* v. *Donnelly*,

470 F.2d 95 (1st Cir. 1972). Thereafter the district court denied the petition for the writ and also denied the application for a certificate of probable cause for appeal under 28 U.S.C. § 2253. Petitioner now applies to this court for the certificate.

The substantive issue which is pressed upon us relates to certain ex parte communications with the trial judge on the part of the prosecution which petitioner claims denied him due process of law, relying in particular on our decision in *Haller* v. *Robbins,* 409 F.2d 857 (1st Cir. 1969). The communications in question were a number of applications for certificates under the Uniform Law to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, Mass. G.L. c. 233, §§ 13A-13D. We agree with the district court that there is no basis to petitioner's constitutional claim and therefore deny the petition for a certificate of probable cause.

The district court, in denying the certificate, found the appeal frivolous within the meaning of *Coppedge* v. *United States.* 369 U.S. 438, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962), which dealt with the test of "good faith" applicable to appeals in forma pauperis. Arguably, a petitioner seeking a certificate from a court of appeals shoulders a somewhat heavier burden. In *Ellis* v. *State of Maine,* 448 F.2d 1325, 1327 (1st Cir. 1971), we said, "we do not propose to overrule a district court's denial of a certificate of probable cause for appeal, after ruling against petitioner, unless there is affirmatively demonstrated to us that such cause in fact exists."

There would appear to be differences among various courts in the articulation of a standard for review in this area, some using the "non-frivolous" standard of *Coppedge* and others using variations of a "substantiality of issues" test. *See,* for recognition of inconsistency in formulations, 43 FRD 343, 351-354 (1967), 50 FRD 153, 176 (1970).

Here, whether there be a significant difference or not in the standard of review of denials of forma pauperis appeals and certificates of probable cause, the district court applied the standard favoring the petitioner. And we are obliged to give "weighty consideration" to that decision. *Nowakowski* v. *Maroney*, 286 U.S. 542, 543, 87 S. Ct. 1197, 18 L. Ed. 2d 282 (1967).

In our earlier involvement in this case, on the issue of granting bail pending hearing on the petition for habeas corpus in the district court, *Glynn* v. *Donnelly*, 470 F.2d 95 (1st Cir. 1972), we held open the issue of substantiality, saying only that petitioner's case was not "a clear one" and that we saw a significant difference between a prosecutor's making ex parte pre-sentencing remarks to the sentencing judge in *Haller* v. *Robbins*, 409 F.2d 857 (1st Cir. 1969), and "the seemingly routine processing under the [Uniform Law to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, Mass. G. L. c. 233, §§ 13A-13D] of applications to secure witnesses from without the jurisdiction." We now hold that the district court did not err in concluding that the appeal was frivolous.

We recognize that the issue was not frivolous in the sense that a court could quickly conclude that it was patently without merit. Counsel made a skillful and sophisticated argument, drawing upon facially relevant analogies. The district court treated the matter thoroughly in a ten page opinion. But the test of frivolity does not rest on the length or deliberateness of a court's reasoning. We also recognize that an issue such as this could be held frivolous by one judge and not so by another. It is precisely in the area where, given the deference of "weighty consideration", we cannot say the district court erred, even though we realize that we are facing an issue

not yet addressed, except by the Supreme Judicial Court in the prior state court proceedings.

The representations of the prosecutor went no further than to present in conclusory terms minimal information necessary to demonstrate the relevance of the requested witnesses' testimony. The certificate of the judge, though phrased in factual terms, merely repeated the representations of the prosecutor to indicate the need for the out-of-state witness. Both application and certificate were directed to what the witness was expected to say. In one application there was reference to a person's prior grand jury testimony. Whether or not the witness would testify as expected was subject to the same uncertainties as attend other justifications for preliminary action. This kind of pre-trial representation seems to us not basically different from seeking a warrant for arrest, a search warrant, an order permitting limited electronic surveillance. In all such cases a judge may be exposed to ex parte assertions which he passes on, not for their truth, but for their legal sufficiency in justifying proposed police action assuming their truth. To say that such exposure disables that judge as a matter of constitutional law from presiding over a subsequent jury trial, because he may consider the ex parte representations in imposing sentence, seems to us to expand the policy of insuring the purity of the court to the point of eliminating faith in it.

We wish to make clear that nothing we say today is meant to diminish in the least our holding in *Haller* v. *Robbins, supra,* that ex parte communications between judge and prosecutor are presumptively improper. But we find that there is a vast difference between a case like *Haller,* where detailed and highly prejudicial information concerning "an episode of sordid behavior" during a kidnapping was conveyed to the judge ex parte, and a case like this one where general and conclusory representa-

tions concerning anticipated testimony of out-of-state witnesses were so communicated. Moreover, whereas in *Haller* we found "no practical necessity" for the ex parte contact, here the contact was in furtherance of the legislative plan for compulsion of the attendance of out-of-state witnesses. Under the circumstances, we find that the rule announced in *Haller* is inapplicable to this case.

We therefore agree with the district court that there is no merit in petitioner's constitutional argument.

The petition for certificate of probable cause is denied.

United States Court of Appeals
For the First Circuit

Misc. No. 73-8046

FRANCIS T GLYNN,
PETITIONER, APPELLANT,

v.

ROBERT H DONNELLY,
RESPONDENT. APPELLEE.

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

ORDER OF COURT

Entered: December 4, 1973

It is ordered that the petition for rehearing filed on October 25, 1973, be, and the same hereby is, denied.

By the Court:

(s) DANA H. GALLUP
Clerk

[cc: Messrs. Kelleher and Chase.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Civ. No. 72-103

FRANCIS T. GLYNN,
PETITIONER,
v.
ROBERT H. DONNELLY, as he is Superintendent of the Massachusetts Correctional Institution at Walpole,
RESPONDENT.

MEMORANDUM AND ORDER ON PETITION FOR WRIT OF HABEAS CORPUS

June 11, 1973

JULIAN, Senior District Judge.

This case is before the Court on a state prisoner's petition for a writ of habeas corpus. Petitioner Glynn was convicted in two jury trials (generally known as the "small loans" cases) on four indictments charging that he conspired to bribe, and did bribe, two executive officers of the Commonwealth of Massachusetts. Petitioner's convictions were affirmed by the Supreme Judicial Court in *Commonwealth* v. *Beneficial Finance Co. et al.*, 1971 Mass. Adv. Sh. 1367, 275 N.E.2d 33.

Upon objection by petitioner to the preliminary hearing before a United States magistrate, this Court held a *de novo* hearing on the petition on January 29, 1973. By stipulation of the parties, only the legal claim embodied in paragraphs 9 and 13 of the petition is pressed in this proceeding. As to that claim, petitioner has indisputably exhausted his state judicial remedies. See *Commonwealth* v. *Beneficial Finance Co., supra,* at 1469-1470, 275 N.E. 2d 33.

Paragraph 9 of the petition reads as follows:

"Verdicts in the First and Second Trials may not

stand because the petitioner was denied Due Process of Law in violation of the Fourteenth Amendment to the Federal Constitution by the application of a rule authorizing the prosecutor to make to the judge (in jury cases) *ex parte* statements bearing on guilt and on disposition, as more fully set forth in paragraph 13 below."

Paragraph 13 of the petition, with record references and footnotes deleted, reads as follows:

"Ten *ex parte* applications for out-of-state process against Redfield and four other persons employed by American Investment were made by the prosecutor on July 20, August 16, October 21 and 26, 1966, to the trial judge who on each occasion granted the application and impounded the papers. The petitioner first heard of this some five months after the verdicts and sentences in the First Trial, and thereafter moved to revoke the impounding orders. It then appeared that on the opening day of the First Trial the prosecutor stated, and the trial judge certified to the California Courts, that Redfield had 'personal knowledge that a sum of money was delivered to another for the purpose of being paid to an executive officer . . . which matters he has testified to before the . . . Grand Jury.' Like statements as to personal knowledge were made on the other occasions. None of these persons was called to the stand, though Redfield appeared in the courtroom on September 14, after adjournment, and was ordered to remain in Massachusetts until October 14, 1966, on an understanding between the Court, the prosecutor and Redfield's counsel that he might return to California until his presence was actually needed.

"Petitioner saved his rights by motion for new trial in the First Case, and by motion that the judge dis-

qualify himself in the Second Trial, both motions being filed on July 18, 1967, and expressly claiming a violation of petitioner's rights under the Due Process Clause of the Fourteenth Amendment. Exceptions were duly taken to the denial of each motion and were incorporated, respectively, in petitioner's Assignment of Error No. 13 in his appeal from the First Trial and his Assignment of Error No. 6 in his appeal in the Second Trial, both appeals being taken to the Supreme Judicial Court under G.L. c. 278, ss. 33A-33G. Said appeals were heard together and were decided adversely to petitioner in a single opinion of the Supreme Judicial Court handed down on November 4, 1971. Mass. Adv. Sh. (1971) 1367 [275 N.E.2d 33]. In that opinion the Court decided that the trial judge acted properly in receiving, granting and impounding the aforesaid *ex parte* applications of the prosecutor:

> '. . . we note that the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, adopted in Massachusetts as G.L. c. 233, ss. 13A-13D, contemplates that the materiality of the testimony of a witness be shown in the certificate of the judge of the demanding State, or else in separate proceedings commenced upon that certificate in the requested state. See People v. Cavanaugh, 69 Cal.2d 262 [70 Cal. Rptr. 438, 444 P.2d 110;] Re Stamler, 279 App. Div., 908 [111 N.Y.S.2d 313]. Presumably, the judge of the demanding State is to satisfy himself that the testimony is in fact material. A bare allegation of materiality, on the part of the prosecution, may not afford a sufficient basis for this determination. State v. Fouquette, 67 Nev. 505, [221 P.2d 404] cert. den.

> 341 U.S. 932 [71 S. Ct. 799, 95 L.Ed. 1361]. Contrary to the defendants' contention, the judge here made no preliminary "findings of conspiracy" on the basis of the prosecution's representations. He merely discharged his duty under the statute. To hold that the prosecution's representations so prejudiced the judge as to preclude a fair trial would render useless the statutory procedure of G.L. c. 233, ss. 13A-13D. Neither the judge's certificate nor the representations were ever seen by the jurors, who, of course, were the finders of fact.' Mass. Adv. Sh. (1971) 1469-70.

This holding of the Supreme Judicial Court directly conflicts with the case of Haller v. Robbins, 409 F.2d 857, 859 (1st Cir., 1969).

> "The rationale given for the decision of the Supreme Judicial Court, that 'the jurors, who, of course, are the finders of fact' never saw the papers filed under the *Uniform Law,* makes it clear that the rule allowing *ex parte* application to the trial judge does not extend to trials without jury. A defendant can thus completely escape the dangers of the rule by waiving a jury. It follows that the decision violates the Due Process Clause of the Fourteenth Amendment by 'needlessly' encouraging waiver of the Sixth Amendment right to trial by jury. United States v. Jackson, 390 U.S. 570, 583 [88 S. Ct. 1209, 20 L.Ed.2d 138]."

This Court concurs in petitioner's view that the constitutional question of whether the statutory procedure for securing the attendance of out-of-state witnesses, as employed by the state court trial judge in the first trial, violated petitioner's right to due process of law is not adequately answered by noting that the trial judge "merely

discharged his duty under the statute." Nor does it suffice to say that the uniform law to secure the attendance of witnesses from without a state in criminal proceedings, M.G.L. c. 233, §§ 13A-13D, would be rendered "useless" if it were held that the "prosecution's representations so prejudiced the judge as to preclude a fair trial." Rather, the issue to be determined is whether petitioner was, in fact, deprived of a fair trial by the prosecution's *ex parte* communication with the trial judge.

In support of his contention that the statutory procedure, as applied, did deprive him of a fair trial, petitioner offers no evidence of prejudicial consequences in the conduct of the trial.[1] Instead, petitioner invokes the doctrine of *Chapman* v. *California,* 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967), that, once a constitutional right has been shown to have been violated, a court, in order to hold the violation harmless, "must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.,* at 24, 87 S. Ct. at 828. In *Chapman,* it was "completely impossible to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioner's convictions." *Id.,* at 26, 87 S. Ct. at 829. On the basis of Chapman, argues petitioner, it is the respondent's burden to demonstrate beyond a reasonable doubt that the prosecution's *ex parte* communications with the trial judge were harmless.

[1, 2] Petitioner's argument rests upon a premise which this Court does not accept as valid. Specifically, petitioner

[1] The parties stipulated that the record of this case would consist of the petition, return, traverse, Exh. 1 (consisting of authentic copies of certain pages of the record filed in the Supreme Judicial Court with respect to the appeals of petitioner from his convictions in the first and second trials), Exh. 2 (the opinion of the Supreme Judicial Court affirming petitioner's convictions), and a substitute stipulation. No transcript of evidence, either in the first or second trial, was offered in evidence in the instant proceeding.

assumes, as he must in order to invoke the support of *Chapman* and of *Haller* v. *Robbins,* 409 F.2d 857 (1st Cir. 1969), that it was constitutional error for the trial judge to pass upon the Commonwealth's requests for out-of-state witnesses under M.G.L. c. 233, §§ 13A-13D. Petitioner's assumption is based upon an unreasonable construction of the trial judge's statutory function under M.G.L. c. 233, §§ 13A-13D. It is clear that in certifying, for example, that "J. Miller Redfield, of Rancho Bernardo, County of San Diego, State of California, is a necessary and material witness for the Commonwealth of Massachusetts at such trial by reason of [the fact that he] has personal knowledge that a sum of money was delivered to another for the purpose of being paid to an executive officer of the Commonwealth of Massachusetts, which matters he has testified to before the Suffolk County Special Grand Jury . . .," the trial judge did not find as a fact that "a sum of money was delivered to another for the purpose of being paid to an executive officer of the Commonwealth of Massachusetts . . . ." Rather, the trial judge certified to the State of California that the testimony of J. Miller Redfield would be "necessary and material" to the Commonwealth of Massachusetts in its criminal prosecutions of petitioner and others. The basis of his certification that Redfield "is a necessary and material witness" was simply the representation of the Attorney General that Redfield "has personal knowledge . . . [etc.]." The question presented by each of the Attorney General's applications — and the only question resolved by the trial judge in issuing the certificates — was whether the alleged testimony of the requested witnesses would be "necessary and material" to the Commonwealth of Massachusetts. As noted by the Supreme Judicial Court in *Commonwealth* v. *Beneficial Finance Co., supra,* at 1469, 275 N.E.2d at 100, "[a] bare allegation of materiality,

on the part of the prosecution, may not afford a sufficient basis" for the determination of the judge of the demanding state that the requested witness is "necessary and material." Thus, the Attorney General, and anyone else seeking to secure the attendance of an out-of-state witness under M.G.L. c. 233, §§ 13A-13D, must make a *prima facie* showing that the witness is material. See *Dirring* v. *United States*, 353 F.2d 519, 520 (1st Cir. 1965); *Commonwealth* v. *Dirring*, 354 Mass. 523, 530, 238 N.E.2d 508 (1968). Once such a showing is made by the applicant, the judge of the demanding state must determine whether the witness "is a material witness in a criminal proceeding pending in a court of record of this commonwealth, or in a grand jury investigation or proceeding which has commenced or is about to commence within the jurisdiction of such court of record." M.G.L. c. 233, § 13B. This is the only finding required by the statute. Reasonably interpreted, the trial judge's issuance of compulsory process was based upon that, and upon no other, finding. No other finding was required to obtain the attendance of out-of-state witnesses deemed necessary by the Commonwealth to prosecute the indictments. The judge did not pass upon the guilt or innocence of petitioner. Nor did he pass upon the credibility of the witnesses whose appearance was sought by the Commonwealth. None of them ever became a witness at any stage of the proceedings before the judge or trial jury. Neither their existence nor the applications, nor the prosecutor's *ex parte* statements, nor the judge's certificates were ever brought to the attention of the trial jury.[2] There is no "reasonable possibility that the [*ex parte* statements] complained of [or the judge's certificates] might have contributed to the conviction" of petitioner. See *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87, 84

[2] Cf. *Chapman* v. *California*, *supra*, in which the prosecutor's remarks and the judge's instructions were addressed to the jury.

S. Ct. 229, 11 L.Ed.2d 171 (1963), cited in *Chapman* v. *California, supra,* 386 at 23, 87 S. Ct. 824. The verdicts of guilty, therefore, were not tainted by federal constitutional error and the rule in *Chapman* is inapplicable.

[3] There is likewise no reasonable possibility that the prosecutor's statement to the judge and the latter's certificates to the California courts might in any way have prejudiced petitioner with respect to the sentence which was imposed upon him.[3] What was stated *ex parte* to the judge by the prosecutor and what was stated by the judge in his certificates would have been relevant only to the issue of guilt and would have added nothing that is not necessarily implied in the verdicts of guilty themselves. Nothing in aggravation of the offenses of which petitioner stands convicted could reasonably be inferred from the prosecutor's statements to the judge or from the judge's certificates. There is no federal constitutional infirmity in petitioner's sentences, and neither *Chapman* nor *Haller* can avail petitioner.

For the foregoing reasons, the Court rejects petitioner's contention that the verdicts and sentences in the first and second trials may not stand because petitioner was denied due process of law by the operation of M.G.L. c. 233, §§ 13A-13D.

[4] Petitioner also contends that the procedure authorized by the uniform law violates the due process clause of the Fourteenth Amendment "by 'needlessly' encouraging waiver of the Sixth Amendment right to trial by jury," citing *United States* v. *Jackson,* 390 U.S. 570, 583, 88 S. Ct. 1209, 20 L.Ed.2d 138 (1968). The underlying assumption of petitioner's argument is that the Supreme Judicial Court, in noting that "the jurors . . . were the finders of fact, "held that the uniform law does not ex-

[3] *Haller* v. *Robbins, supra,* in which the prosecutor's *ex parte* communication was directed to the sentencing judge.

tend to trials without jury. Thus, petitioner argues, "a defendant can . . . completely escape the dangers of the [uniform law] by waiving a jury." Petition, ¶ 13.

[5] Even assuming that petitioner is correct in his interpretation of what appears to be dictum in *Commonwealth* v. *Beneficial Finance Co., supra,* at 1470, 275 N.E.2d 33, petitioner cannot be heard to complain that he (as opposed to "a defendant") was needlessly encouraged to waive a trial by jury. The undisputed fact is that petitioner did not waive his right to a jury trial, either in the first or second trial. Nor does the record before this Court even suggest that petitioner ever considered such a waiver in light of the uniform law.[4]

The Court, therefore, rejects petitioner's claim that the uniform law imposed an impermissible burden upon the exercise of his constitutional right to a trial by jury.

For the foregoing reasons, it is ordered that the petition for a writ of habeas corpus be, and the same hereby is, denied.

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[4] According to the petition, petitioner first learned of the use of the uniform law "some five months after the verdicts and sentences in the First Trial . . . ." Petition, ¶13.

Massachusetts Uniform Witness Act

UNIFORM LAW TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS

MASSACHUSETTS GENERAL LAWS, CHAPTER 233

§ 13A. If a certificate wherein a judge of a court of record in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal actions, prosecutions and other criminal proceedings pending, or grand jury investigations and other proceedings commenced or about to commence, in this commonwealth certifies under the seal of such court that there is a criminal proceeding pending in such court, or that a grand jury investigation or proceeding has commenced or is about to commence within the jurisdiction of such court, that a person being within this commonwealth is a material witness in such proceeding or investigation and that his presence will be required for a specified number of days, is presented to a justice of the superior court sitting in and for the county, or the justice or a special justice of the district court in the judicial district, in which such person is, such justice or special justice shall make an order directing such person to appear at a time and place certain for a hearing upon the question of compelling his attendance at such proceeding or investigation.

If at the hearing the justice or special justice determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the proceeding or investigation in such other state, and that the laws of such other state and of any other state through which the witness may be required to pass by the ordinary traveled route will give to him protection from arrest and the service of process, civil or criminal, as provided in section thirteen C, he shall issue

a summons, which term shall include a subpoena, order or other notice requiring the appearance of a witness in any state where such process is used in lieu of a summons, with a copy of such certificate attached, directing the witness to attend and testify in the court where the proceeding is pending, or before the grand jury before which the investigation or proceeding has commenced or is about to commence, at a time and place specified in the summons. At any such hearing such certificate shall be prima facie evidence of all the facts stated therein.

If in any such certificate it is recommended that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance at such a proceeding or investigation therein, such justice or special justice may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing and the justice or special justice at the hearing, if satisfied of the desirability of such custody and delivery, for which determination such certificate shall be prima facie evidence of such desirability, may, in lieu of issuing a summons, order that said witness be taken into custody and delivered to an officer of the requesting state.

If a witness who is summoned as hereinbefore provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the place where the proceeding is pending, or the grand jury investigation or proceeding has commenced or is about to commence, and five dollars for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of a witness who disobeys a summons issued from a court of record of this commonwealth.

§ *13B.* If a person in any state which by its laws has

made provision for commanding persons within its borders to attend and testify in criminal proceedings pending, or grand jury investigations and proceedings commenced or about to commence, in this commonwealth is a material witness in a criminal proceeding pending in a court of record of this commonwealth, or in a grand jury investigation or proceeding which has commenced or is about to commence within the jurisdiction of such a court of record, a justice or special justice of such court may issue a certificate under the seal of the court, stating such facts and specifying the number of days the witness will be required, which certificate may be presented in accordance with the laws of such other state to a magistrate or officer thereof for appropriate action to secure the attendance of such witness in this commonwealth. Such certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this commonwealth to assure his attendance in this commonwealth.

If the witness is summoned to attend and testify in this commonwealth he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the place where the criminal proceeding is pending, or the grand jury investigation or proceeding has commenced or is about to commence, and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this commonwealth a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court having jurisdiction of the criminal proceeding or grand jury investigation or proceeding; and any court order that such witness remain after the time for which he was summoned shall be conditioned upon the immediate tender to him of five dollars for each day

during which his further attendance as a witness is ordered. If such a witness, after coming into this commonwealth, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of a witness who disobeys a summons issued from a court of record of this commonwealth.

§ *13C*. If a person comes into this commonwealth in obedience to a summons or order directing him to attend and testify in a criminal proceeding or grand jury investigation or proceeding in this commonwealth he shall not, while in this commonwealth pursuant to such summons or order, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this commonwealth under the summons or order.

If a person passes through this commonwealth while going to another state in obedience to a summons or order to attend and testify in a criminal proceeding or grand jury investigation or proceeding in that state, or while returning therefrom, he shall not, while so passing through this commonwealth, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this commonwealth under the summons or order.

Nothing in this section or either of the two preceding sections shall preclude action under sections twelve and thirteen or under similar reciprocal provisions of law in other states.

§ *13D*. Sections thirteen A to thirteen C, inclusive, may be cited as the uniform law to secure the attendance of witnesses from without a state in criminal proceedings, and shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of the states which enact similar laws.